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No. 82-1826

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARCHIE BOND, JR., *et al.*,
Petitioners,

vs.

GENERAL MOTORS CORP., *et al.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENTS', INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND ITS LOCAL UNION NO. 1005, BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is fully presented in the Petition for Certiorari at pp. A-1 - A-3. The unreported opinion of the United States District Court for the Northern District of Ohio is set forth in the Petition for Certiorari at pp. B-1 - B-26.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition for Certiorari.

STATUTE INVOLVED

Reference to the appropriate statute adequately appears in the Petition for Certiorari.

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Sixth Circuit correctly held that the resolution of a grievance by a joint labor management committee is not subject to judicial review where the grievance was resolved pursuant to an exclusive, final, binding and nonappealable method agreed to by the parties.

COUNTERSTATEMENT OF THE CASE

Petitioners are employees of Respondent General Motors Corporation (hereinafter "GM") and are also members of Respondent Unions, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local Union No. 1005 (hereinafter "UAW").

Petitioners were laid off from their employment at various times in 1979 and 1980. During these periods of unemployment, each of the Petitioners applied for and received supplemental unemployment benefits (hereinafter "SUB") pursuant to an agreement between GM and the UAW entitled "Supplemental Agreement Covering Supplemental Unemployment Benefit Plan" (hereinafter "Supplemental Agreement").

Contemporaneous with Petitioner's layoffs, the UAW filed petitions with the Secretary of Labor seeking adjustment assistance (hereinafter "TRA") for its members pursuant to the Trade Act of 1974, 19 U.S.C. Section 2101 et. seq. The relevant portions of the Trade Act provide a scheme whereby workers who have been separated from their employment because of foreign competition are guaranteed seventy percent (70%) of the their average weekly wage during the period of separation.

In May of 1980, the Department of Labor issued a Certificate of Eligibility that included the location where Petitioners' worked.

Subsequently, Petitioners applied for and received TRA benefits for periods of time in which they were laid off from GM's facility. Due to the lengthy time period required to process TRA claims, two of the Petitioners received a lump sum payment of retroactive TRA benefits for the same weeks in which they had already received SUB benefits. As a result, two of the Petitioners received in excess of one hundred percent (100%) of their normal take-home pay, despite the fact that they were unemployed.

Because of the receipt of TRA benefits, GM determined that two of the Petitioners had received an overpayment of SUB benefits. Pursuant to the Supplemental Agreement, they were notified of the overpayment but Petitioner Bond refused to make restitution. As a result, GM, in accordance with the Supplemental Agreement, began deducting Thirty Dollars ($30.00) per week from Petitioner Bond's paychecks.

Petitioner Bond filed a grievance protesting the Company's action, alleging, among other grounds, that he had not been notified of the overpayment within one hundred twenty (120) days of when the overpayment was established.

Grievances, under the Supplemental Agreement, are handled pursuant to a separate grievance/appeals procedure. There is a two step process wherein an employee, and not the UAW, may challenge the determination of SUB benefits by filing a written appeal with the Local Committee. The Local Committee is composed of an equal number of GM and UAW representatives. The Local Committee, by a unanimous vote, has the power to finally resolve an employee's appeal. Only if the appeal is not resolved in this matter may an employee obtain the right to appeal to the second and final level, the Board of Administration. The Board is comprised of three UAW representatives, three

GM representatives and an impartial Chairman. The impartial Chairman only votes if an issue cannot be resolved by a majority of the other members of the Board. The Supplemental Agreement mandates that the appeals procedure is final, binding and non-appealable.

The Local Committee unanimously determined that Petitioner Bond's grievance had no merit and denied it. More specifically, the Local Committee held that Petitioner Bond's overpayment was established in September 1980 and he was notified of that fact in October, well within the 120 day notice period. Under the agreement, therefore, Petitioner Bond was not entitled to pursue his grievance to the Board of Administration.

The Board of Administration itself has subsequently addressed the issue of when an overpayment is established or created. (App. pp. A-1 - A-23). In two other SUB overpayment cases the Board concluded that the earliest possible date an overpayment is established or created is the date that GM becomes aware that TRA benefits causing the overpayment were in fact paid. (App. pp. A-5 and A-17) Here, Petitioner Bond and GM were notified in September of the overpayment and the letter seeking recoupment was sent out in October, well within the 120 days.

Following the resolution of Petitioner Bond's grievance, he and the other Petitioners filed the instant action pursuant to 29 U.S.C. Section 185, Section 301 of the Labor Management Relations Act (hereinafter "LMRA"). Petitioners sought damages against GM for breach of the collective bargaining agreement and against the UAW for a breach of the duty of fair representation.

Respondents GM and the UAW filed motions to dismiss and the District Court dismissed Petitioners' complaint, concluding that Petitioner Bond's grievance had been finally resolved pursuant to the grievance procedure outlined in the Supplemental Agreement. The District Court also concluded that Petitioners

had been unable to demonstrate a breach of the duty of fair representation. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court concluding that the actions of the UAW and GM were in accordance with the contractual provisions of their agreement and adopted the analysis of the legal issues as presented by the District Court.

Petitioners are not challenging the conclusion of the District Court and the Court of Appeals that there was no breach of the duty of fair representation. Petitioners are urging instead that this Court address the issue of whether an employee is entitled to have his grievance heard by an impartial arbitrator or in the alternative, by a district court even where there is no breach of the duty of fair representation.

REASONS FOR DENYING THE WRIT

I. The Courts Below Explicitly Followed And Correctly Applied The Controlling Decisions Of This Court.

The premise of Petitioners' argument is that the SUB appeal procedure should be subject to judicial review because the procedure is somehow not procedurally "fair". In support of their contention, Petitioners argue that a joint committee which resolves grievances is inherently not as effective as an impartial arbitrator in resolving grievances. Implicit in Petitioners' arguments is the novel idea that employees have an absolute right to have grievances arbitrated regardless of the merits of the grievances, and regardless of the collective bargaining process. These contentions reflect a true misunderstanding of Federal labor law.

In the case at bar, GM and the UAW contractually agreed to certain procedures for the resolution of grievances pertaining to the Supplemental Agreement. Here, Petitioner Bond's grievance was rejected upon consideration at Step I of the process.

Since the parties to the contract have agreed to be bound by this method of dispute resolution, Petitioners must meet a heavy burden in challenging that procedure through judicial review. Federal law requires that judicial deference be given to the grievance procedure disputed here. This strict rule is essential to maintain the system of industrial conflict resolution first explicated by this Court in the Steelworkers Trilogy. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960).

Nowhere is this policy set forth with greater clarity than in the Labor Management Relations Act itself, 29 U.S.C. Section 173(d), which provides in pertinent part:

> "*Final adjustment by a method agreed upon by the parties* is hereby declared to be the described method for settlement of grievance disputes arising over the *application or interpretation* of an existing collective bargaining agreement." (Emphasis supplied).

In its dismissal of Petitioners' claim, the District Court, affirmed by the Sixth Circuit Court of Appeals, correctly and cogently restated the applicable Federal law as follows:

> "It can no longer be questioned that federal policy favors resolution of disputes by a method agreed upon by parties to a collective bargaining agreement. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63, 96 S. Ct. 1048, 1055-1056 (1976); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 80 S. Ct. 1343 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358 (1960); *United Steelworkers of America* v. *Warrier and Gulf Navigation Co.* 363 U.S. 574, 80 S. Ct. 1347 (1960).

> "In order to further this policy, 'courts ordinarily defer to collectively bargained dispute resolution procedures when the party's dispute arises out of the collective bargaining process,' *Barentine* v. *Arkansas Best Freight System*, ____ U.S. ____, 101 S. Ct. 1437, 1442 (1981); *Hines* v. *Anchor Motor Freight, Inc. supra* at 562-63, 96 S. Ct. at 1055-56; and, absent particular circumstances, the award of the arbitrator is final and binding if the contract so provides. See e.g. *Humphrey* v. *Moore*, 375 U.S. 335, 351, 84 S. Ct. 363, 372; *United Steelworkers of America* v. *Enterprise Wheel and Car Co., supra* at 598-99, 80 S. Ct. 1361-62; *Morris* v. *Werner Continental, Inc.*, 466 F. 2d 1185, 1188-89, (6th Cir. 1972) *cert. denied* 411 U.S. 963, 93 S. Ct. 2144 (1973)." (Petition at p. B-15 - B-16).

In their brief, Petitioners attempt to attack the finality of the parties' chosen grievance resolution procedure by attacking the procedure itself, rather than its particular application, contrary to the teachings of *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). Petitioners contend that a decision by a joint union-management committee is not as binding as a decision by an arbitrator. This argument simply has no merit. The District Court below correctly noted as follows:

> "Moreover, contrary to plaintiffs' assertions, decision of a joint committee selected by the parties for definitive settlement of grievances is accorded the same degree of finality as a decision of a neutral arbitrator. See e.g. *Hines* v. *Anchor Motor Freight, Inc., supra; Humphrey* v. *Moore, supra; General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Riss and Co.*, 372 U.S. 517, 83 S. Ct. 789 (1963)." (Petition at p. B-16 - B-17).

In *General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Riss and Co.*, 372 U.S. 517 (1963), this Court squarely held that a decision by a joint committee was entitled to the same weight as that of an arbitrator. This Court stated as follows:

> "Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under Section 301. And if the Joint Area Cartage Committee's award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance." 372 U.S. at 519.

Petitioners contentions are simply devoid of merit. The underlying premise of their petition is the existence of a "right to arbitrate" grievances. That premise has no basis in law. Furthermore, despite Petitioners' contentions, the Supplemental Agreement does provide for the impartial chairman to decide the merits of grievances where a majority of the National Board could not do so. In the instant case, however, because Petitioner Bond's grievance was finally resolved by the Local Committee, the National Board and its impartial chairman never had to consider Petitioner Bond's appeal.

Petitioners further claim that judicial deference to the Local Committee's decision should not be afforded because GM and the UAW have a financial interest in the outcome of the grievance and, therefore, they cannot be impartial arbitrators. This claim is specious for two reasons. First of all, Federal law does not require use of "impartial" parties because it seeks to encourage an outcome that the parties themselves, as the draftsmen of the collective bargaining agreement, can live with. Secondly, neither GM nor the UAW have a pecuniary interest in the outcome of Petitioners' grievance. GM and the UAW are simply seeking a result that is beneficial to all of the potential recipients of SUB benefits. Depletion of the fund by the individuals who collect well over 100% of their take-home pay depletes the SUB fund which would result in the denial of benefits to other UAW members.

The frivolous nature of Petitioners' claim becomes abundantly clear when they argue that the alleged deficiencies in the grievance procedure empower the Court to reweigh the merits of the grievance, even without a showing of the breach of the

duty of fair representation. Federal labor law recognizes but one exception to the general rule of finality accorded to contractual grievance resolution and that is where a union breaches its duty of fair representation. *Hines* v. *Anchor Motor Freight, supra; Vaca* v. *Sipes*, 386 U.S. 171 (1967). See also *Ruzicka* v. *General Motors*, 649 F. 2d 1207 (6th Cir. 1981). Petitioners are not disputing the findings of the District Court and the Sixth Circuit that there has been no breach of the duty of fair representation. Yet they continue to maintain that they are entitled to have a Court decide the merits of their case despite the fact the UAW handled the matter properly and despite the fact that the grievance was finally settled pursuant to a procedure agreed to by GM and the UAW.

In summary, there is simply no basis in Federal law that an employee has an absolute right to have a grievance arbitrated before an "impartial" third party nor is there any basis in law to claim that the federal courts should consider the merits of grievances finally and totally settled pursuant to the contract entered into between the parties. Therefore, there is simply no basis for granting certiorari in this case.

II. The Decisions Relied Upon By The Petitioners Are Distinguishable On Their Facts And On The Law.

Petitioners have cited a number of cases for the general proposition that if a grievance procedure is inadequate or unfair, then an employee should be entitled to proceed with his or her claim in district court. The cases relied upon by the Petitioners do not stand for this proposition. The cases cited by the Petitioners, namely *Clayton* v. *UAW*, 451 U.S. 679 (1981), *Geddes* v. *Chrysler Corp.*, 608 F. 2d 261 (6th Cir. 1979), *Tinsley* v. *United Parcel Service*, 665 F. 2d 778 (7th Cir. 1981), *Farmer* v. *ARA Services, Inc.*, 660 F. 2d 1096 (6th Cir. 1981) are all cases which deal with whether an employee should first have to exhaust his internal union procedures before commencing suit under Section 301 of the LMRA in suing his employer for

breach of contract and his union for a breach of the duty of fair representation. These cases are not ones that deal with the adequacy or inadequacy of the grievance procedure itself, but deal instead with whether the union's internal union procedure is adequate for the purposes of affording an employee the relief that he might be able to obtain if the underlying grievance had been pursued by the union.

The procedure in question, in the instant case, was not an internal union procedure, but rather a contractually agreed to grievance procedure between GM and the UAW designed for the purposes of resolving grievances under the Supplemental Agreement. Therefore, the Petitioners' reliance upon *Clayton* and its progeny to attack the grievance procedure here, is totally misplaced.

The Petitioners also rely upon two other cases which have absolutely nothing to do with the issues involved in the instant case. Petitioners cite *NLRB* v. *Marine Workers*, 391 U.S. 418 (1968) and *Helton* v. *NLRB*, 656 F. 2d 883 (D.C. Cir. 1981) for the proposition that it is not in the interest of labor policy to coerce employees to utilize the Supplemental Agreement's procedure without any possible resort to pursuing their rights in Court. *Marine Workers* was concerned with an unfair labor practice charge filed against a union for allegedly expelling one of its members for filing an earlier unfair labor practice charge before pursuing his internal union procedures. The instant case has absolutely noting to do with unfair labor practice charges, the pursuit of internal union procedures nor with a union taking disciplinary action against a member for pursuing his rights in any forum. Likewise, *Helton* was concerned with an unfair labor practice charge brought against a union which sought to prevent a member from posting materials critical of the union on a union bulletin board. Again, the instant case has nothing to do with unfair labor practice charges nor any disciplinary action taken against one of the UAW's members. Petitioners' reliance upon these cases is again completely misplaced.

Finally, the Petitioner relies upon *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324 (1969) for the proposition that an employee should not have to submit his complaint to the same group that he is suing. *Glover* was a case brought pursuant to the Railway Labor Act where this Court determined that black employees who were claiming that members of the union and the employer had discriminated against them on the basis of race need not exhaust the grievance procedure, for it would be futile to do so. Petitioners' application to this Court is not concerned with exhaustion at all, but rather is concerned only with whether employees should be able to sue their employer and their union despite the fact that these parties had agreed, without any proof of unlawful discrimination, that their grievance had absolutely no merit. Again, Petitioner relies on a case that has no applicability to the instant one.

In summary, the opinions relied upon by the Petitioner are concerned with matters that are factually and legally distinguishable from the instant one and provide no basis for their request for a Writ of Certiorari.

III. The Results Urged By The Petitioners Would Be Totally Inequitable And Would Destroy The Present Structure of Labor Management Relations.

Petitioners are apparently seeking to have a court decide that their interpretation of a provision of the Supplemental Agreement is the correct one. Petitioners seek to argue that the overpayment at issue was "established" more than 120 days prior to GM seeking recoupment. The Local Committee determined that Petitioner Bond's overpayment was established in September of 1980 when it was determined that he would receive a specific amount of SUB benefits and GM was so notified. Thus, when Petitioner Bond was notified of the overpayment in October of 1980, that was well within the 120 day period. This interpretation of the Supplementary Agreement has also been subsequently upheld by the Board of Administration in two other cases.

(App. p. A-5 and A-17). The Petitioners' contentions have thus been totally rejected, not only by the Local Committee, but by the parties to the Supplemental Agreement through the Board of Administration.

What the Petitioners ultimately seek is a ruling from a court which would permit them to collect, while they were not working, well over 100% of what they were making while employed by GM. The overpayment, here, if permitted, would allow the Petitioners and the national class that they seek to certify to receive unemployment compensation, SUB benefits and TRA benefits amounting to well over a 100% of their wages while working. Not surprisingly, the Board of Administration, seeking to protect the integrity of the SUB fund for employees to be laid off in the future, sought to recoup the SUB money to the benefit of all GM employees and UAW members so that they might receive the 95% of what they were making while they were working. Instead, the Petitioners seek a result that would permit some to receive well over 100%, thus depleting the SUB Plan and thus depriving others of all or a portion of their SUB benefits.

Furthermore, the result urged by the Petitioners with regards to the grievance procedure itself would totally destroy labor management relations as we presently know it. If the result urged by the Petitioners was adopted, recalcitrant employees could sue their employer and their union on any grievance resolved pursuant to a grievance procedure simply because they disagreed with those results. It would no longer be necessary for an employee to prove or even allege a breach of the duty of fair representation because employees would only have to demonstrate that the procedure did not permit the arbitration of their grievances. The parties to a collective bargaining agreement would no longer be able to control the terms and conditions of their agreement. It would be for employees and the courts to determine the meaning and applicability of terms included in collective bargaining agreements. The courts would

thus be flooded with Section 301 suits brought by individuals seeking new interpretations of those agreements despite the fact that the parties who drafted the terms agree as to their meaning. On this ground alone, Petitioners' request for a Writ of Certiorari must be denied.

CONCLUSION

For the reasons set forth herein, Respondent UAW respectfully submits that the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June 1983, a copy of the foregoing Brief was mailed by regular U. S. Mail, postage prepaid, to Frank J. Groh-Wargo and John J. Wargo, Wargo, Wargo and Walters Co., L.P.A., 43 East Bridge Street, Berea, Ohio 44017, Attorneys for Petitioners and to Dennis M. Kelly and Janet L. Miller, Jones, Day, Reavis & Pogue, 1700 Union Commerce Building, Cleveland, Ohio 44115, Attorneys for Respondent General Motors.

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APPENDIX A

Board of Administration Case No. 1276

NOTICE OF BOARD OF ADMINISTRATION DECISION

Supplemental Unemployment Benefit Plan Pursuant To Agreement Between General Motors Corporation And The UAW

Division: GM Assembly Division

Location or Plant: Leeds, Missouri

Address: 6817 Stadium Drive, Kansas City, MO 64129

Local Committee Case No. —

Employe Involved: Bennie McKenzie (et al)

DECISION OF BOARD

It is the determination of the Board of Administration that the amount of the SUBenefit overpayment stated on the "Determination of Overpayment of SUBenefits By Reason of Receipt of Trade Readjustment Allowance Benefits" form previously furnished the claimants is a valid amount due and owing to the SUB Trust Fund. The claimants, therefore, are required to repay such amount of overpayment in accordance with the SUB Plan Provisions.

(Signatures Illegible)

Date July 23, 1981

GM-UAW

SUB BOARD OF ADMINISTRATION

Bennie McKenzie (et al), GM Assembly Division - Leeds Plant

Re: Notice of Overpayment - 120 Day Time Limit

STATEMENT OF FACTS

On April 21, 1981, the GM-UAW Board of Administration advised Bennie McKenzie, Anthony McKenzie, Gary White and Edward Reidlinger (hereafter "claimants") that an appeal would be accepted by the Board from the unanimous determination of the Local SUB Committee. On May 6, 1981, the Board received an "appeal"[1] from the above named individuals and Jane Tuttle. Because Jane Tuttle has never filed an appeal with the Local SUB Committee, she cannot institute an appeal now at the Board level.

The GM-UAW Supplemental Unemployment Benefit (SUB) Plan is a private plan, negotiated by the UAW and GM, to supplement the governmental unemployment insurance system, and covers approximately 430,000 employes. It provides for weekly SUBenefits to eligible employes for periods of unemployment. The weekly SUBenefit for full weeks of layoff is equal to the difference between 95% of weekly after-tax pay and the state system benefit (less $12.50 for work-related expenses not incurred and other earnings).[2] Since 1970, Article IX, Section 23 of the Plan has specifically defined "State System" to include any "federal laws for paying benefits to persons on account of their unemployment (such as the Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962, as amended, and the Trade Act of 1974)". This definition was clarified in the Plan language to

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[1] The "appeal" consists of a cover sheet enclosing approximately three inches of pleadings filed by plaintiffs in McKenzie, et al. v. General Motors Corporation, et al., (Civil Action No. 80-0966-CV-W-6 U.S. Disrict Court, W.D. of Missouri). Attempting to glean from those pleadings those matters which could have been presented to the Board has caused some delay.

[2] Article II, Section 1(a) (the full text of the relevant Plan provisions and Trade Act of 1974 citations are attached as an Appendix).

make it clear that Trade Readjustment Allowances (TRA) were to be treated the same as state unemployment compensation (UC) benefits. To have provided otherwise under the Plan would result in an unemployed worker eligible for state UC benefits, TRA and SUB receiving much more in benefits when unemployed than in wages when working full time, which is not in accordance with the SUB Plan's basic purpose.

In January 1980, the UAW petitioned for worker adjustment assistance under the Trade Act of 1974. By decision dated April 25, 1980, the U.S. Department of Labor certified the GMAD Leeds plant in Kansas City, Missouri, with an impact date of October 1, 1979 (TA-W-7078).[3]

In the second week of May 1980, claimants made application for TRA benefits with the state agency. On or after May 21, 1980, claimants received their retroactive TRA payment for all weeks of unemployment going back to the October 1, 1979 impact date.

Claimants had previously received weekly SUBenefits in supplementation of state UC benefits for these same weeks of unemployment covered by the retroactive TRA payments. With the TRA benefits paid in addition to the state UC and SUBenefits, the claimants were then in receipt of approximately 145% of their weekly after-tax pay for the same week of unemployment. After the Company became aware of the payment of the retroactive TRA benefits, pursuant to its authority under Article II, Section 6(a) of the Plan, it determined that a

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[3] Workers laid off on or after October 1, 1979 were eligible for the weekly TRA benefit - 70% of average weekly wage not to exceed the national average weekly wage, currently $289 - for all weeks of unemployment after October 1, 1979. (Section 232 of Trade Act of 1974.)

SUBenefit overpayment had been "established or created". A notice of the SUBenefit overpayment was sent to the claimants on September 9, 1980, within 120 days of the date the Company had ascertained that the claimants had received their TRA benefits in late May 1980. The overpayment amounts owed ranged from $919.73 for B. McKenzie to $1,722.44 for E. Reidlinger.

When claimants failed to make voluntary repayments to the SUB Trust Fund as requested in the overpayment notice, the Company commenced weekly payroll deductions of $30 per week for transfer to the SUB Trust Fund, pursuant to Article II, Section 6(b) of the Plan. Under the Plan, such payroll deductions continue until the total overpayment is recovered.

DISCUSSION

From the documentation submitted by the claimants, it appears that the claimants make the following arguments:

1. The Board did not send claimants the notice of overpayment within 120 days from the date the overpayment was "established or created".

2. The recovery of overpayments by payroll deductions is a violation of the Trade Act of 1974 and its regulations (29 C.F.R. Section 91.60).

3. The appeal procedures under the SUB Plan do not satisfy the requirements of the Employee Retirement Income Security Act (ERISA) of 1974.

As to the first argument, the Board does not agree that the phrase "from the date the overpayment was established or created" means the date that the Department of Labor issues its certification. A certificaiton itself does not establish or create a SUB overpayment. The SUB overpayment cannot be "established or created" until the employe applications to the state (or other applicable governmental agency) are processed

for determinations with respect to TRA benefit eligibility and amount, and benefit checks are issued. The SUBenefit overpayments are "established or created" as of the date the Company becomes aware that the TRA benefits which caused the overpayment were paid. This interpretation is based on the fact that certification of the plant does not automatically mean that any individual employe of that plant receives TRA. In order to receive TRA, an individual employe must show that he or she was laid off for at least one week:

1. after the certification's impact date;
2. from adversely affected employment;
3. and in the 52 week period preceding that layoff, received wages or $30 or more for at least 26 weeks.[4]

Some employes cannot meet all of these requirements. Moreover, the state agency's ability to process thousands of applications and begin making payments varied considerably from state to state. A few states did not begin making significant payments until July 1980 or later.

Under the claimants' interpretation - that the overpayment was "established or created" as of the date of the certification issued by the Department of Labor - the Company would have been required to stop SUB payments immediately as of April 25, 1980. While this would have reduced a significant portion of the overpayment amount and relieved the recovery problem, it would have resulted in unemployed workers receiving only state UC while waiting for weeks and months for the state to process their TRA applications. Those employes ultimately found not eligible for TRA would have been denied weekly SUBenefits to which they were rightfully entitled. Claimants' proposed interpretation is neither a reasonable view of the words "established or created", nor is it fair to SUB participants.

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[4] Section 231 of Trade Act of 1974.

The purpose of the 120-day period is to place a time limit on the Company or Board's authority to notify an employe that a SUBenefit overpayment exists. The time limit begins with the date the overpayment is "established or created" and ends 120 days thereafter. Once an employe has been notified of an overpayment in a timely fashion, there are no time limits which preclude the Board or the Company from seeking repayment of prior SUB payments, i.e., the SUB payment declared to be an overpayment could have been received well before the start of the 120-day period.

Claimants also argue that the Board approach is not consistent with its application of the phrase "received or receivable"[3], i.e., an employe not applying for TRA *may still have* an overpayment because the state system benefit (TRA) is "receivable".

The purpose of this provision is to encourage employes to file for state system benefits for which they could be eligible. The fact is that the vast majority of employes in a certified plant meet all eligibility requirements for TRA. The Board therefore finds nothing inconsistent in presuming certified employes eligible for such TRA benefits and declaring SUB overpayments when an employe refuses to apply for TRA benefits. The employe can negate the overpayment determination by submitting satisfactory evidence of a TRA denial. In non-application situations, the Board does not use the date of certification as the date from which the SUB overpayment was "established or created".

* * *

The Board now addresses the claimants' second and third appeal arguments alleging violations of federal law. Although the Board's authority is limited to interpreting the Plan document, the following responses and observations are made:

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[3] Article II, Section 3(a)(1).

After careful review, the Board cannot discern any possible violations of the Trade Act of 1974 or ERISA. From claimants' pleadings, the Board notes that the U.S. Secretary of Labor, charged with administering these provisions of the Trade Act of 1974, has rejected claimants' second argument. Section 91.60 of 29 C.F.R. does provide that TRA benefits are exempt from levy, execution, attachment, garnishment, etc. However, the Company, by the recovery of SUB overpayments, is not attempting to levy or garnish TRA benefits—TRA benefits remain intact. The Company seeks only the recovery of SUBenefits previously paid. It is also clear that employes may repay SUBenefit overpayments from his or her funds derived from any source.

As to the third argument, claimants' right of review now has been honored through two separate appeal stages: the Local SUB Committee and the GM-UAW Board of Administration. ERISA requires a full and fair internal review process which addresses the issues raised and renders a written decision; it does not guarantee a *successful* appeal.

* * *

The Board also notes that claimants have not been treated any differently from the thousands of fellow employes who received TRA benefits in dozens of GM plants across the United States in 1980. Indeed, these same procedures were also used for the Trade Act of 1974 certifications issued in 1975 by the U.S. Department of Labor.

The Board's review of claimants' legal pleadings shows no justification for permitting them to receive far more income while unemployed than while working. This was not the intent of the parties to the Plan, and the Board cannot interpret the Plan to support the claimants' position.

Regarding the claimants' contention that they are being improperly made a conduit of payments to General Motors, the

weekly payroll deductions made by the Company are in fact paid directly to the Trustee and deposited to the SUB Trust Fund for the *exclusive* benefit of present and future SUB claimants (including these claimants if they are eligible).

Claimants say that General Motors does not have to make contributions once the maximum funding level has been reached. Maximum funding has not been reached since January 1967. At the time claimants began their lawsuit (October 1980), the fund was at 3.6% of maximum funding. As of July 1981, the funding level is 32%. With the present high level of layoffs, it is impossible to predict when, if ever, the maximum funding level will be reached.

DISPOSITION BY GM-UAW BOARD OF ADMINISTRATION

The Board of Administration has reviewed the information forwarded in connection with this appeal case, and, based upon the facts submitted, has arrived at the following:

1. This case originally was resolved by the Local Committee in accordance with the provisions of Article V, Section 3 of the 1979 GM-UAW SUB Plan.

2. In accordance with GM-UAW SUB Plan Board of Administration letter dated April 21, 1981, the claimants were advised, in part, that:

   ". . .the GM-UAW SUB Plan Board of Administration has been authorized by the parties to the current 1979 GM-UAW SUB Plan, to accept your appeal from the unanimous determination of the Local SUB Committee at the GMAD-Leeds plant in Kansas City, Missouri. The Local Committee's determination concerned the issue of recovery of SUBenefit overpayment amounts caused by your entitlement to Trade Readjustment Allowance (TRA) Benefits which are payable under the federal Trade Act of 1974.

"This special authorization is in recognition of the importance of this issue and its national impact at various General Motors locations. This Board of Administration, therefore, will entertain your appeal, consider all facts and arguments presented and make its final determination. ...

"The Board of Administration will consider all memoranda submitted and make its determination based on the written record. ..."

3. Article II, Section 1(a) provides that a Regular Benefit payable to an eligible employe for any week shall be an amount which, when added to his State Benefit and Other Compensation, will equal 95% of his after-tax pay, minus $12.50.

4. Article II, Section 3(a)(1) states that an Employe's State Benefit and Other Compensation for a week includes the amount of State System Benefit received or receivable.

5. Article IX, Definition (23) defines "State System" to include the Trade Readjustment Allowances provided under the Trade Act of 1974.

6. The overpayment notice required under Article II, Section 6(a) was issued within the specified time limits.

7. Article V, Section 3(b)(2)(vi) provides "There shall be no appeal from the Board's decision. It shall be final and binding upon the Union, its members, the Employe, the Trustee, and the Company."

Accordingly, it is the determination of the Board of Administration that the amount of the SUBenefit overpayment stated on the "Determination of Overpayment of SUBenefits By Reason

of Receipt of Trade Readjustment Allowance Benefits" form previously furnished the claimants is a valid amount due and owing to the SUB Trust Fund. The claimants, therefore, are required to repay such amount of overpayment in accordance with the SUB Plan Provisions.

Issued and approved on July 23, 1981 by the Board of Administration.

(Signatures Illegible)

APPENDIX

I. UAW -GM SUB Plan

Article II, Section 3(a)(1) - "An Employe's State Benefit and Other Compensation for a Week means the amount of State System Benefit received or receivable by the Employe for the Week. . ."

Article IX, Definition (23) - ". . . 'State System Benefit' means an unemployment benefit payable under a *State System*. . ." (emphasis added)

Article IX, Definition (23) - " 'State System' means any system or program established pursuant to any state or federal law for paying benefits to persons on account of their unemployment under which a person's eligibility for benefit payments is not determined by application of a 'means' or 'disability' test. State System also includes: (a) any system or program established by law to supplement, replace or extend the benefits available under any state or federal laws for paying benefits to persons on account of their unemployment (such as the Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962, as amended, and the Trade Act of 1974). . ."

Article II, Section 6(a) - "If the Company or the Board determines that any Benefit(s) paid under the Plan should not have been paid or should have been paid in a lesser amount, written notice thereof shall be mailed to the Employe receiving the Benefit(s) and he shall return the amount of overpayment to the Trustee or Company whichever is applicable; provided, however, that no repayment shall be required if the cumulative overpayment is $3 or less or if notice has not been given within 120 days from the date the overpayment was established or created, except that no such time limitations shall be applicable in cases of fraud or willful misrepresentation."

Article II, Section (6)(b) - "If the Employe shall fail to return such amount of overpayment promptly: (1) with respect to Benefit paid from the Fund, the Trustee shall arrange to reimurse the Fund for the amount of overpayment by making a deduction from any future Benefits (not to exceed $20 from any 1 Benefit except in cases of fraud or willful misrepresentation) or Separation Payment otherwise payable to the Employe, or by requesting the Company to make a deduction from future Benefits or compensation payable by the Company to the Employe (not to exceed $30 from any 1 check except in cases of fraud or willful misrepresentation), or both."

II. **Trade Act of 1974**

PART I - TRADE READJUSTMENT ALLOWANCES

SEC. 231. QUALIFYING REQUIREMENTS FOR WORKERS

Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subchapter A who files an application for such allowance for any week of unemployment which begins after the date specified in such certification pursuant to section 223(a), if the following conditions are met:

(1) Such worker's last total or partial separation before his application under this chapter, occurred—

(A) on or after the date, as specified in the certification under which he is covered, on which total or partial separation began or threatened to begin in the adversely affected employment, and

(B) before the expiration of the 2-year period beginning on the date on which the determination under section 2273 was made, and

(C) before the termination date (if any) determined pursuant to section 223(d); and

(2) Such worker had, in the 52 weeks immediately preceding such total or partial separation, at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm, or, if data with respect to weeks of employment are not available, equivalent amounts of employment computed under regulations prescribed by the Secretary.

SEC. 232. WEEKLY AMOUNTS.

(a) Subject to the other provisions of this section, the trade readjustment allowance payable to an adversely affected worker for a week of unemployment shall be—

(1) 70 percent of his average weekly wage (but not in excess of the average weekly manufacturing wage), reduced by

(2) 50 percent of the amount of the remuneration for services performed during such week.

CODE OF FEDERAL REGULATIONS

S91.60 Exemption

Any assignment, pledge, or encumbrance of any right to adjustment assistance which is or may become due and payable under this Part 91 shall be void; and such right to adjustment assistance shall be exempt from levy, execution, attachment, garnishment, order for the payment of attorney fees, offset or recovery of overpayments under any law other than the Act, or any other remedy whatsoever provided for the collection of debt whether owed to the United States, a State, or a person; and adjustment assistance received by an individual shall be exempt from any remedy whatsoever for the collection of all debts, necessaries furnished to such individual or the individual's family during the time when such individual was unemployed. Any waiver of the exemption provided for in this section shall be void.

APPENDIX B

GENERAL MOTORS CORPORATION

August 28, 1981

James E. McDaniel, Esquire
818 Olive Street-1400
St. Louis, Missouri 63101

Morris J. Levin, Esquire
Levin, Weinhaus & Ely
515 Olive Street
St. Louis, Missouri 63101

Re: Alphonso Lumpkins, et al.
GM Assembly Division - St. Louis Plant

Dear Sirs:

Enclosed please find a copy of the decision from the GM-UAW SUB Board of Administration. The decision was issued and approved on August 28, 1981.

Very truly yours,

OTIS M. SMITH
General Counsel

David M. Davis
Attorney

DMD:dep
Enclosure

cc: Leonard Page, Esquire

SUB BOARD OF ADMINISTRATION

Alphonso Lumpkins (et al), GM Assembly Division - St. Louis Plant

Re: Notice of Overpayment - 120 Day Time Limit

BACKGROUND

A properly filed Local Committee Appeal to the GM-UAW Board of Administration was received by the Board on June 4, 1981. THis is a test case for all similarly situated GMAD - St. Louis employes.

The Board has previously issued a decision in an appeal arising from GMAD - Leeds, Board of Administration Case #1276. Although the Board believes the Leeds decision is controlling in this matter, it nevertheless will respond to the claimant's arguments raised herein. This decision considers certain other arguments that may have been raised by claimants. By considering these additional arguments, it is hoped that the claimants will more fully understand the administration of the Plan.

STATEMENT OF FACTS

In January 1980, the UAW petitioned for worker adjustment assistance under the Trade Act of 1974. By decision dated May 1, 1980, the U.S. Department of Labor certifed the GMAD plant in St. Louis, Missouri, with an impact date of June 1, 1979 (TA-W-7081). The "impact date" set forth in the certification is selected by the Department of Labor as the earliest date that layoffs can be attributed to increased imports.[1]

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[1] The "impact date" cannot go back more than one year prior to the date of the petition. (Section 223(b) of the Trade Act of 1974.) Workers laid off prior to the impact date are not eligible for TRA even if their layoffs continue past the impact date. Since a delay in filing a petition can result in a total loss of TRA for workers laid off prior to the impact date, the UAW attempts to file petitions for adjustment assistance as soon as imports appear to be a factor causing domestic unemployment.

The claimant subsequently made application for TRA benefits with the state agency. On or after July 11, 1980, claimant received his retroactive TRA payment for all weeks of unemployment going back to the June 1, 1979 impact date.[3]

The claimant had previously received weekly SUBenefits in supplementation of state UC benefits for the same weeks of unemployment covered by the retroactive TRA payments. With the TRA benefits paid in addition to the state UC and SUBenefits, the claimant was then in receipt of approximately 140% of his weekly after-tax pay for the same week of unemployment.

On or about July 18, 1980 the Company was notified by the state of Missouri that checks representing retroactive awards of TRA had been issued commencing July 11, 1980. Pursuant to its authority under Article II, Section 6(a) of the Plan, it determined that a SUBenefit overpayment had been "established or created". A notice of the SUBenefit overpayment dated August 27, 1980 was sent to the claimant within 120 days of July 18, 1980. The overpayment amount owed was $4,055.

The claimant initially received $4,667.82 in Regular SUBenefits for the weeks of layoff covered by the overpayment notice. For each of the weeks involved, the weekly SUBenefit exceeded the amount of TRA received by $15.75 to $34.75. Therefore, because a SUBenefit remains payable for each such week, no credit units will be restored to the claimant when the overpayment is repaid.

If the claimant fails to make voluntary repayments to the SUB Trust Fund as requested in the overpayment notice and returns

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[3] Workers laid off on or after June 1, 1979 were eligible for the weekly TRA benefit - 70% of average weekly wage not to exceed the national average weekly wage, currently $289 - for all weeks of unemployment after June 1, 1979. (Section 232 of Trade Act of 1974.)

to active work with the Company, the Company will commence weekly payroll deductions of $30 per week for transfer to the SUB Trust Fund, pursuant to Article II, Section 6(b) of the Plan. If the claimant files a future SUB application, $20 will be withheld from his benefit pursuant to the same Plan provision. Under the Plan, such deductions continue until the total overpayment is recovered. The weekly deductions made by the Company are paid directly to the Trustee and deposited to the SUB Trust Fund for the exclusive benefit of present and future SUB claimants (including this claimant if he is eligible).

DISCUSSION

The claimant makes the following arguments:

1. The Board did not send claimant the notice of overpayment within 120 days from the date the overpayment was "established or created", i.e., from the date of receipt of the SUBenefits.

2. TRA benefits received are not deductible from SUBenefit payments.

As to the first argument in this case, the Board does not agree that the phrase "from the date the overpayment was established or created" means the date that the SUBenefits were paid. An overpayment of the previously paid SUBenefits cannot be "established or created" until the employe's application to the state (or other applicable governmental agency) is (a) processed for determination with respect to TRA benefit eligibility and amount, (b) benefit checks are issued, and (c) the Company becomes aware that the TRA benefits which causd the overpayment were paid.

The purpose of the 120-day period is to place a time limit on the Company or Board's authority to notify an employe that a SUBenefit overpayment exists. The time limit begins with the date the overpayment is "established or created" and ends 120

days thereafter. The 120-day time period applies only to the time within which the employe must be notified after an overpayment is "established or created". If the employe is notified within the prescribed time limit, the Company may then seek repayment of the entire SUB overpayment.

As to the second argument, the Board notes that the GM-UAW Supplemental Unemployment Benefit (SUB) Plan is a private plan, negotiated by the UAW and GM, to supplement the governmental unemployment insurance system, and covers approximately 430,000 employes. It provides for weekly SUBenefits to eligible employes for periods of unemployment. The weekly SUBenefit for full weeks of layoff is equal to the difference between 95% of weekly after-tax pay and the State System benefit (less $12.50 for work-related expenses not incurred and other earnings).[3]

Since 1970, Article IX, Section 23 of the Plan has specifically defined "State System" to include any "federal laws for paying benefits to persons on account of their unemployment (such as the Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962, as amended, and the Trade Act of 1974)". Trade Readjustment Allowances (TRA), therefore, are treated the same as state unemployment compensation (UC) benefits. To have provided otherwise under the Plan would result in an unemployed worker eligible for state UC benefits, TRA and SUB receiving much more in benefits when unemployed than in wages when working full time, a result not in accord with the SUB Plan's basic purpose.

The Board also notes that the claimant has not been treated any differently from the thousands of fellow employes who received TRA benefits in dozens of GM plants across the United States in 1980. Indeed, these same procedures were also used for the Trade Act of 1974 certifications issued in 1975 by the U.S.

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[3] Article II, Section 1(a)

Department of Labor. By the recovery of the SUBenefit overpayment, the Company is not subverting the purpose of the Trade Act but is enforcing the terms of the SUB Plan in accordance with the intent of the parties. The Company is not seeking the payment of TRA to the SUB Trust Fund. An employe may repay SUBenefit overpayments from his or her funds derived from any source. The Company seeks only the return of SUB overpayments to strengthen the Fund in the interest of all participants.

The Board's review of claimant's appeal shows no justification for permitting him to receive far more income while unemployed than while working. This was not the intent of the parties to the Plan, and the Board cannot interpret the Plan to support the claimant's position.

DISPOSITION BY GM-UAW BOARD OF ADMINISTRATION

The Board of Administration has reviewed the information forwarded in connection with this appeal case, and, based upon the facts submitted, has arrived at the following:

1. This case was properly appealed by the Local Committee to the Board in accordance with the provisions of Article V, Section 3 of the 1979 GM-UAW SUB Plan.

2. Article II, Section 1(a) provides that a Regular Benefit payable to an eligible employe for any week shall be an amount which, when added to his State Benefit and Other Compensation, will equal 95% of his after-tax pay, minus $12.50.

3. Article II, Section 3(a)(1) states that an Employe's State Benefit and Other Compensation for a week includes the amount of State System Benefit received or receivable.

4. Article IX, Definition 23 provides that "State System" and "State System Benefit" includes the Trade Readjustment Allowances payable under the Trade Act of 1974.

5. The overpayment notice required under Article II, Section 6(a) was issued within 120 days from the date that the SUBenefit overpayment was "established or created".

6. Article V, Section 3(b)(2)(vi) provides "There shall be no appeal from the Board's decision. It shall be final and binding upon the Union, its members, the Employe, the Trustee, and the Company."

Accordingly, it is the determination of the Board of Administration that the amount of the SUBenefit overpayment stated on the "Determination of Overpayment of SUBenefits By Reason of Receipt of Trade Readjustment Allowance Benefits" form previously furnished the claimant is a valid amount due and owing to the SUB Trust Fund. The claimant, therefore, is required to repay such amount of overpayment in accordance with the SUB Plan provisions.

Issued and approved on August 28, 1981 by the Board of Administration.

(Signatures Illegible)

APPENDIX

I. UAW - GM SUB Plan

Article II, Section 3(a)(1) - "An Employe's State Benefit and Other Compensation for a Week means the amount of State System Benefit received or receivable by the Employe for the Week. . ."

Article IX, Definition (23) - ". . . 'State System Benefit' means an unemployment benefit payable under a *State System*. . ." (emphasis added)

Article IX, Definition (23) - " 'State System' means any system or program established pursuant to any state or federal law for paying benefits to persons on account of their unemployment under which a person's eligibility for benefit payments is not determined by application of a 'means' or 'disability' test. State System also includes: (a) any system or program established by law to supplement, replace or extend the benefits available under any state or federal laws for paying benefits to persons on account of their unemployment (such as the Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962, as amended, and the Trade Act of 1974). . ."

Article II, Section 6(a) - "If the Company or the Board determines that any Benefit(s) paid under the Plan should not have been paid or should have been paid in a lesser amount, written notice thereof shall be mailed to the Employe receiving the Benefit(s) and he shall return the amount of overpayment to the Trustee or Company which ever is applicable; provided, however, that no repayment shall be required if the cumulative overpayment is $3 or less or if notice has not been given within 120 days from the date the overpayment was established or created, except that no such time limitations shall be applicable in cases of fraud or willful misrepresentation."

Article II, Section (6)(b) - "If the Employe shall fail to return such amount of overpayment promptly: (1)with respect to Benefit paid from the Fund, the Trustee shall arrange to reimburse the Fund for the amount of overpayment by making a deduction from any future Benefits (not to exceed $20 from any 1 Benefit except in cases of fraud or willful misrepresentation) or Separation Payment otherwise payable to the Employe, or by requesting the Company to make a deduction from future Benefits or compensation payable by the Company to the Employe (not to exceed $30 from any 1 check except in cases of fraud or willful misrepresentation), or both."

II. Trade Act of 1974

SEC. 223. DETERMINATIONS BY SECRETARY OF LABOR

(b) A certification under this section shall not apply to any worker whose last total or partial separation from the firm or appropriate subdivision of the firm before his application under section 231 occurred—

(1) more than one year before the date of the petition on which such certification was granted, or

(2) more than 6 months before the effective date of this chapter.

SEC. 231. QUALIFYING REQUIREMENTS FOR WORKERS

Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subchapter A who files an application for such allowance for any week of unemployment which begins after the date specified in such certification pursuant to section 223(a), if the following conditions are met:

(1) Such worker's last total or partial separation before his application under this chapter, occurred—

(A) on or after the date, as specified in the certification under which he is covered, on which total or partial separation began or threatened to begin in the adversely affected employment, and

(B) before the expiration of the 2-year period beginning on the date on which the determination under section 2273 was made, and

(C) before the termination date (if any) determined pursuant to section 223(d); and

(2) Such worker had, in the 52 weeks immediately preceding such total or partial separation, at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm, or, if data with respect to weeks of employment are not available, equivalent amounts of employment computed under regulations prescribed by the Secretary.

SEC. 232. WEEKLY AMOUNTS

(a) Subject to the other provisions of this section, the trade readjustment allowance payable to an adversely affected worker for a week of unemployment shall be—

(1) 70 percent of his average weekly wage (but not in excess of the average weekly manufacturing wage), reduced by

(2) 50 percent of the amount of the remuneration for services performed during such week.

APPENDIX C

29 U.S.C. Section 173(d)

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.